No. 06-91

In The
Supreme Court of the United States

DIETRICH & ASSOCIATES, P.L.C.,

Petitioner,

v.

CAROLYN ROGERS, GEOFFREY FIEGER, and FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should decline jurisdiction over a state court action that does not raise a federal question.

LIST OF PARTIES

Petitioner Dietrich & Associates, P.L.C. is the successor to Dietrich & Cassavaugh, P.C., the employer of attorney John Rogers, the decedent in the underlying wrongful death suit out of which this alleged referral fee dispute arises.

Respondent Carolyn Rogers is the personal representative of the estate of John Rogers.

Respondent Geoffrey Fieger is the attorney who represented the estate of John Rogers in the underlying wrongful death lawsuit.

Respondent Fieger, Fieger, Kenney & Johnson is Respondent Geoffrey Fieger's law firm.

CORPORATE DISCLOSURE

Respondent Fieger, Fieger, Kenney and Johnson P.C. is a privately held professional corporation.

Geoffrey Fieger and Carolyn Rogers are private citizens.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Carolyn Rogers, Geoffrey Fieger, and Fieger, Fieger, Kenney & Johnson respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Order of the Michigan Supreme Court that denied Petitioner's application for leave to appeal to the Michigan Supreme Court from the unpublished Michigan Court of Appeals decision.

OPINIONS BELOW

The January 27, 2005 unpublished panel opinion from the Michigan Court of Appeals affirmed the Wayne County circuit court's grant of summary disposition on *res judicata* grounds (Petitioner's Apx A). The October 31, 2005 Michigan Supreme Court order denying leave is reported at 474 Mich. 898, 705 N.W.2d 113 (2005) (Petitioner's Apx B). The February 27, 2006 order denying reconsideration is reported at 474 Mich. 1065, 711 N.W.2d 299 (2006) (Petitioner's Apx C).

JURISDICTION

Petitioner alleges jurisdiction under the 28 U.S.C. § 1257(a) clause that the state court decision addresses a contention that a title right, privilege, or immunity is "set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." In fact, the petition raises no

federal question but only issues of Michigan *res judicata* law.

STATEMENT OF THE CASE

I. Overview

This petition is at odds with basic principles of Michigan's *res judicata* law barring successive suits over the same claim. The Fourteenth Amendment due process clause is not remotely implicated by the Michigan decisions.

The man pulling the strings behind the curtain in this case is Edgar Dietrich, a former Michigan lawyer, whose license was revoked in 2001. Dietrich now conducts his deception through inexperienced and unsuspecting lawyers and legal assistants. This case has been handled through Dietrich's office, a literal revolving door of attorneys, who are fed misinformation by Dietrich himself. In fact, Petitioner Dietrich & Associates P.L.C., is presently inactive as a legal entity in Michigan.

II. Underlying Facts

In 1989 John Rogers was a skilled attorney employed as an associate by Petitioner's predecessor, Dietrich & Cassavaugh, P.C. The firm agreed to pay Rogers a percentage of the fees generated by work he performed on the firm's files. One morning, on his way to court, John Rogers was the innocent victim of a high-speed, reckless City of Detroit police car chase. He was killed in the accident, leaving his pregnant widow, Carol Rogers.

Edgar Dietrich, through Dietrich & Cassavaugh, P.C., boasts that they "took care" of the Rogers' probate estate for no charge, but he deserves no pat on the back. While Dietrich obtained a $450,000 settlement on the uninsured motorist policy, this settlement was $50,000 *below* policy limits, when damages clearly exceeded the policy limits. Although it is true that Dietrich negotiated Mr. Rogers' workers compensation claim, even this is somewhat suspicious since Dietrich was Rogers' employer.

The worst conflict was created in Petitioner's handling of the Rogers estate. At the time of his death, Rogers was working on numerous contingency fee cases for the law firm. As the attorney for the estate, Petitioner had a fiduciary duty to the estate to collect the monies owed to the estate, including *quantum meruit* attorney fees on the cases that Mr. Rogers had worked on that were later resolved. In fact, Petitioner never paid this money into the Rogers estate.

Attorney Geoffrey Fieger filed a wrongful death lawsuit against the City of Detroit Police Department and obtained a $6.2 million jury verdict for the Rogers estate. After a protracted and costly appellate battle to the Michigan Supreme Court, Fieger and his law firm recovered over $11 million dollars for the estate. *Rogers v. City of Detroit*, 457 Mich. 125, 579 N.W.2d 840 (1998). The Fieger law firm represented the Rogers estate throughout the decade-long case and was solely responsible for the outcome. Petitioner has since repeatedly, unsuccessfully, claimed entitlement to a portion of the attorney fee in the wrongful death case.

III. The First Referral Fee Suit

Petitioner sued Fieger and his law firm for a referral fee, but the Wayne County circuit court granted summary disposition for Fieger, ruling that Dietrich failed to prove the existence of a valid referral fee. The Michigan Court of Appeals affirmed in a December 28, 2001 unpublished opinion (No. 224870) saying, "We affirm the trial court for the reason it stated: plaintiffs performed no work in the *Rogers* case." (Respondent's Apx 6). Reconsideration was denied on February 25, 2002, and Dietrich's leave application to the Michigan Supreme Court was denied on January 30, 2003.

IV. The Present Suit

Undeterred, Petitioner sought yet another bite of the apple by filing another lawsuit in the adjacent Oakland County circuit court adding Carolyn Rogers as a party and claiming a conspiracy with Fieger. (Petitioner's Apx E). The Oakland circuit court dismissed Petitioner's claim specifically finding that "Plaintiff's claims have been previously adjudicated in the Wayne County Circuit Court, the Michigan Court of Appeals, and Michigan Supreme Court." The Michigan Court of Appeals affirmed on *res judicata* grounds. (Petitioner's Apx A). The Michigan Supreme Court denied leave. (Petitioner's Apx B).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court Should Decline Jurisdiction Because The Petition Does Not Raise A Federal Question.

Merely alleging a federal question does not give rise to Supreme Court jurisdiction; rather the case must turn on "a real and not merely formal Federal question." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311, 23 S.Ct 123, 47 L.Ed. 190 (1902) ["it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction"]. The federal question must be substantial. The Court will not consider questions that are so lacking in substance that no further argument is required. *Hodges v. Snyder*, 261 U.S. 600, 601, 43 S.Ct. 435, 67 L.Ed. 819 (1923) ["It should [not] be granted if the questions on which the decision depends are so wanting in substance as not to need further argument"]. This petition presents no "important federal question" or "important question of federal law." Sup. Ct. R. 10. Until this petition, Dietrich had raised no federal question at all.

Assuming arguendo that there is a federal question, it was neither "pressed" by Petitioner, nor "passed upon" by any Michigan court. See e.g., *Illinois v. Gates*, 462 U.S. 213, 218, n.1, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) [issue must either be raised or "squarely considered and resolved" by state court]. It is important in a federal system to give state courts the first chance to evaluate the constitutionality of state statutes which might be construed to save their constitutionality. *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 11 L.Ed.2d 298 (1969) [dismissed writ when petitioner failed to raise, and state court failed to pass on, issue]. As the *Cardinale* Court remarked,

"Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."

It is incumbent upon Petitioner to establish that the federal issue it now raises was timely pressed or passed upon, but Petitioner did not, and cannot, do so. Neither its Michigan Court of Appeals brief, nor its Michigan Supreme Court leave application or supplemental brief, nor its leave denial reconsideration motion raised any federal question. Moreover, this Court has specifically held that the application of *res judicata* is a matter of state law over which the Supreme Court has no jurisdiction. *Mansell v. Mansell*, 490 U.S. 581, 586, n.5, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

Relying upon, *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) and *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999), Petitioner asserts that the present petition represents an "extreme application of *res judicata* inconsistent with a federal right," but those decisions are inapposite. First, in both *Richards* and *South Central Bell*, the issue was both raised at, and "squarely considered" by, the Alabama Supreme Court. Moreover, in both cases, it was petitioners who were strangers to the prior judgment. Here, Respondent Carolyn Rogers, a privy of Fieger and the Fieger law firm throughout the lawsuit, but who was not named in the previous suit by Petitioner. The claim preclusion in this case affects Petitioner Dietrich & Associates, P.L.C., who was the same claimant in the first lawsuit. As the Michigan state courts properly recognized, these two cases are the same causes of action.

Moreover, even if a case satisfies 28 U.S.C. § 1257, the court may simply choose not to review it. Sup. Ct. R. 10 makes it clear that review is discretionary and will be granted only for "compelling reasons." The petition fails this test. Throughout the Michigan proceedings, Petitioner never once raised a federal question, much less "an important federal question." This case meets the criteria of neither Sup. Ct. R. 10 nor 28 U.S.C. § 1257. It would be inappropriate for this Court to exercise its jurisdiction.

CONCLUSION

The petition should be denied because it raises only a Michigan state law issue unique to Petitioner. The federal issue Petitioner now proposes was never "pressed or passed upon" by any Michigan court. The Michigan decision rests on independent and adequate state grounds.

Respectfully submitted,

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Date: August 21, 2006

2001 WL 1699846

STATE OF MICHIGAN

COURT OF APPEALS

DIETRICH & ASSOCIATES P.L.C., DIETRICH & CASSAVAUGH, P.C., and EDGAR J. DIETRICH, Plaintiffs-Appellants,	UNPUBLISHED December 28, 2001
v	No. 224870 Wayne Circuit Court LC No. 98-837522-CK
GEOFFREY FIEGER and FIEGER, FIEGER & SCHWARTZ, P.C., Defendants-Appellees.	

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition under MCR 2.116(C)(7) and (10) in favor of defendants. We affirm.

This case involves a dispute regarding an alleged referral fee between plaintiff Edgar J. Dietrich and his law firm and Geoffrey Fieger and his law firm. Fieger represented Carol Rogers, the widow of John Rogers, who has been an attorney with plaintiff Dietrich & Cassavaugh, P.C. (the predecessor to Dietrich & Associates, P.L.C.) in a wrongful death suit arising out of John Rogers' death in an automobile accident (involving a high-speed police chase) as he was traveling to the Wayne County Circuit Court. Plaintiffs contend that they are owed a substantial referral

fee following the jury's verdict, which exceeded six million dollars.[1]

Following defendants' motion for summary disposition, the trial court granted summary disposition in favor of defendants, ruling that plaintiffs failed to prove the existence of a valid referral fee. More specifically, the trial court ruled that there was no showing, pursuant to the requirements of MRPC 1.5(e), that Carol Rogers was advised of and did not object to the division of the attorney fee between plaintiffs and defendants. On appeal, plaintiffs argue that the trial court erred in granting summary disposition for defendants because the motion was not properly before the trial court, the trial court applied the wrong standard of review, and there was no evidence supporting the position taken by defendant as a matter of fact and law. Plaintiffs also argue that the trial court failed to properly rule on their claim that a settlement agreement was breached and failed to rule on their quantum meruit claim.

The trial court granted summary disposition under MCR 2.116(C)(7) (invalid contract) and (10) (no genuine issue as to any material fact and defendants entitled to judgment as a matter of law). A trial court's ruling on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Under both MCR 2.116(C)(7) and (10), the pleadings, affidavits, admissions, depositions, and other documentary evidence filed in the action or submitted by the parties must be considered by the court. MCR 2.116(G)(5).

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[1] Our Supreme Court ultimately upheld the jury's verdict in *Rogers v. Detroit,* 457 Mich 125; 579 NW2d 840 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and the evidence must be evaluated in a light most favorable to the nonmoving party. *Maiden, supra,* p 120. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs first contend that the trial court erred in granting summary disposition because a default had been entered against defendants on February 18, 1999, and defendants filed their motion for summary disposition (on May 12, 1999) before the default was set aside (in an order entered on May 18, 1999). Plaintiffs, therefore, argue that the motion for summary disposition was not properly before the trial court. This issue is actually waived for appellate review because plaintiffs never raised this issue before the trial court. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, we do not believe that this issue compels reversal because defendants moved to set aside the default on April 22, 1999, the hearing was held on May 5, 1999, at which time the trial court orally ruled that it was setting aside the default, and the order memorializing this ruling was entered on May 18, 1999, six days after defendants filed their motion for summary disposition. Additionally, the hearing on defendants' motion for summary disposition was held on December 14, 1999, and plaintiffs never argued that this motion was not properly before the trial court.

Plaintiffs also argue that the trial court applied the wrong standard of review in ruling on the motion and that defendants failed to come forward with admissible evidence to support the motion. Plaintiffs' argument is

meritless. The trial court did not apply the wrong standard of review. Moreover, the evidentiary burden to prove the existence of a valid contract is on plaintiffs, not on defendants. MCR 2.116(G)(4) "plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden, supra,* p 121. As stated in *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. . . . The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. . . . Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. . . . If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.

The trial court's ruling was premised on MRPC 1.5(e), which states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of and does not object to the participation of all lawyers involved; and
>
> (2) the total fee is reasonable.

The comment to MRPC 1.5 states that "[p]aragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object." The trial court specifically ruled that there was no evidence that Carol Rogers, the client, was advised of and did not object to the division of fees.

Upon review of the record, we agree with the trial court that plaintiffs presented no evidence that Carol Rogers was advised of, and consequently did not object to, any division of the attorney fee. Although there is some indication that there was an agreement or understanding between the lawyers regarding a division of the fee, there is simply no evidence that Carol Rogers was advised of this division as required by MRPC 1.5(e). In fact, Carol Rogers, in a letter dated November 30, 1998, specifically stated that Dietrich did not advise her of any attempt to obtain a division of the fee. Therefore, plaintiffs have failed to meet their evidentiary burden of proving a genuine issue of a material fact regarding the division of the attorney fee.

Plaintiffs also argue that the trial court erred by failing to enforce a settlement agreement. However, no settlement agreement was actually entered into in this case. Although there were settlement discussions or negotiations, the parties never entered into any settlement agreement. Under MCR 2.507(H), to be binding, an agreement between the parties must be made in open court or in writing. Because no settlement agreement was made in open court or in writing, there was no settlement agreement for the trial court to enforce.

Lastly, plaintiffs contend that the trial court erred in failing to rule on their quantum meruit claim. The trial court's specific ruling was that "the lack of [a] contract for the referral fee is outcome determinative" and did not believe that it was necessary to rule more specifically on the quantum meruit claim. The trial court further stated, "Mr. Dietrich did nothing with respect to [Mr. Fieger's] prosecution of the wrongful death case."

Plaintiffs argue that should this Court find that there was no referral fee contract, then the quantum meruit claim should be addressed, acknowledging that a quantum meruit claim normally arises where there is no referral fee agreement. An attorney may be entitled to compensation for the reasonable value of services rendered on the basis of quantum meruit, provided that the attorney's discharge was wrongful or the withdrawal was with cause. *Morris v Detroit,* 189 Mich App 271, 278; 472 NW2d 43 (1991). Although plaintiffs maintain that they acted as co-counsel in the underlying *Rogers* case and "did considerable and valuable work for Mrs. Rogers," plaintiffs do not state exactly what work they performed on the *Rogers* case.

We affirm the trial court for the reason it stated: plaintiffs performed no work on the *Rogers* case. After judgment had been entered in the *Rogers* case, plaintiffs moved to intervene as co-counsel and the trial court denied the motion. Plaintiffs' subsequent motion for recognition of lien on the judgment proceeds on the underlying *Rogers* case was also denied by the trial court. There is no evidence that plaintiffs ever represented Carol Rogers in the underlying wrongful death case and there is no evidence that plaintiffs performed any work on that case.

Consequently, plaintiffs have not shown that they are entitled to a fee under a theory of quantum meruit.

Affirmed.

/s/ Mark J. Cavanaugh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen